

<b>TO: Mail Stop 8</b> <b>Director of the U.S. Patent and Trademark Office</b> <b>P.O. Box 1450</b> <b>Alexandria, VA 22313-1450</b>	<b>REPORT ON THE</b> <b>FILING OR DETERMINATION OF AN</b> <b>ACTION REGARDING A PATENT OR</b> <b>TRADEMARK</b>
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In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been  
 filed in the U.S. District Court \_\_\_\_\_ at Cincinnati \_\_\_\_\_ on the following ☐ Patents or ☒ Trademarks:

DOCKET NO. 1:08-cv-714	DATE FILED 10/15/08	U.S. DISTRICT COURT Southern District of Ohio
PLAINTIFF Touchstone Merchandise Group, LLC		DEFENDANT Novelty, Inc.
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 6,267,582		See attached complaint.
2		
3		
4		
5		

In the above—entitled case, the following patent(s)/ trademark(s) have been included:

DATE INCLUDED	INCLUDED BY <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading	
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1		See attached complaint.
2		
3		
4		
5		

In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT

CLERK JAMES BONINI	(BY) DEPUTY CLERK s/Shawntel Jackson	DATE 10/16/08
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Copy 1—Upon initiation of action, mail this copy to Director    Copy 3—Upon termination of action, mail this copy to Director  
 Copy 2—Upon filing document adding patent(s), mail this copy to Director    Copy 4—Case file copy

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

FILED  
JAMES J. HARRIS  
CLERK  
08 OCT 15 PM 4:00

Touchstone Merchandise Group, LLC,

Plaintiff,

vs.

Novelty, Inc.,

Defendant.

Civil Action No.

**1:08 CV 714**

**J. BARRETT**

**COMPLAINT**

**Demand for Jury Trial**

For its Complaint against Defendant, Plaintiff Touchstone states as follows:

1. Plaintiff Touchstone Merchandise Group, LLC ("Touchstone") is a limited liability company of the State of Ohio maintaining a principal place of business at 7405 Industrial Row Drive, Mason, Ohio 45040, within this judicial district.
2. On information and belief, Defendant Novelty, Inc. ("Novelty") is a corporation with a principal place of business at 351 West Muskegon Drive, Greenfield, Indiana.
3. This Court has jurisdiction under 28 U.S.C §§ 1331 and 1332.
4. Venue is proper in this District.
5. In 2006, Touchstone purchased from Novelty, and Novelty subsequently delivered to Touchstone's customer, a quantity of disposable pocket lighters ("Lighters").
6. On information and belief, Novelty regularly deals in goods of this type.
7. Novelty expressly represented to Touchstone that Novelty had the legal right to produce, import and sell the Lighters.

8. On information and belief, such representation was false.
9. Touchstone relied upon Novelty's representations.
10. Further, in providing such Lighters to Touchstone, Novelty impliedly warranted to Touchstone that the Lighters would be delivered free of the rightful claim of any third person by way of infringement or the like.
11. On or about February 12, 2008, Guang Lin ("Lin") brought suit in the United States District Court for the District of South Carolina (the "South Carolina Action"), alleging that Touchstone infringed United States Patent No. 6,267,582 ("the '582 patent.") by using, selling, offering for sale, and/or importing the Lighters. Lin sought an award of damages adequate to compensate for such alleged infringement, in no event less than a reasonable royalty, together with interest and costs, and an injunction preliminarily and permanently enjoining Touchstone from further infringement.
12. Touchstone requested that Novelty indemnify and defend it in the South Carolina Action, but Novelty refused.
13. In the South Carolina Action, Touchstone denied that it had infringed the '582 Patent, and that Lin was entitled to any relief whatsoever.
14. On July 7, 2008, Touchstone filed a third party complaint against Novelty in the South Carolina Action alleging, *inter alia*, :

[Touchstone] is informed and believes that, in the event it is determined, decided, adjudged, or allowed that the Touchstone should recover the damages alleged in its Complaint under the cause of action asserted therein, [Touchstone] would be and is entitled to judgment over and against Third-Party Defendant Novelty, Inc. for any and all sums thereby awarded to [Lin] against [Touchstone] and for full indemnification by Third-Party Defendant Novelty, Inc. for any loss or damage, including attorneys fees, that [Touchstone] may sustain or incur herein, as such would have been the direct and proximate result of the breach by Third-Party Defendant Novelty, Inc. of its implied warranty to [Touchstone].

If the infringement and damage occurred as alleged in the Complaint, which is denied and which is alleged here solely for the purposes of this Third-Party Complaint, such infringement and damage was the direct and proximate result of the acts and/or omissions of Third-Party Defendant Novelty, Inc.

[Touchstone] is informed and believes that, in the event it is determined, decided, adjudged, or allowed that [Lin] should recover the damages alleged in its Complaint under the cause of action asserted therein, [Touchstone] would be and is entitled to judgment over and against Third-Party Defendant Novelty, Inc. for any and all sums thereby awarded to [Lin] against [Touchstone] and for full indemnification by Third-Party Defendant Novelty, Inc. for any loss or damage, including attorneys fees, that [Touchstone] may sustain or incur herein, as [Touchstone] had no active culpability in this matter and a sufficient relationship exists between [Touchstone] and Third-Party Defendant Novelty, Inc. to give rise to a duty to indemnify.

**WHEREFORE**, [Touchstone] prays:

In the event that there is a verdict for [Lin] against [Touchstone], [Touchstone] prays for indemnity, including all amounts it is required to pay [Lin] along with attorneys' fees, costs, and such other and further relief as this Court deems just and proper from Third-Party Defendant Novelty, Inc.; and

Such other and further relief as the Court deems just and proper.

15. At the time of the filing of the present action, Novelty had not answered, filed a summary judgment motion, or filed a responsive pleading in the South Carolina Action.
16. Beginning in September, 2008, Touchstone engaged in settlement discussions with Lin, and requested Novelty's participation in the settlement. On September 18, 2008, Touchstone placed Novelty on notice that if it did not participate in the settlement, Touchstone would unilaterally make its "own deal with [Lin] and seek full indemnity for that amount and all associated attorneys' fees and costs from Novelty." Novelty refused to participate in the settlement.
17. On September 24, 2008, Touchstone again solicited Novelty's participation in the settlement with Lin, and reiterated that "[i]f Novelty refuses to participate, we will strike whatever deal makes sense, which will not involve Novelty in any way. . . . If Touchstone has to pay the

entire settlement itself, it will look to Novelty for reimbursement of the settlement amount, as well as any legal expenses incurred in connection with Lin's infringement charges." Novelty did not respond to Touchstone.

18. On October 3, 2008, Touchstone notified Novelty that it had reached settlement with Lin, and outlined terms of the settlement. Touchstone once again requested Novelty's participation in the settlement. Novelty continued to refuse to participate.
19. On October 8, 2008, Touchstone and Lin resolved their dispute in the South Carolina Action.
20. Novelty has not agreed to reimburse Touchstone for any amount incurred in defending or settling the South Carolina Action.
21. Novelty's actions have been willful and in bad faith, and/or violate the implied covenant of good faith and fair dealing.
22. Touchstone has been damaged by the forgoing acts and/or omissions of Novelty in an amount exceeding \$75,000.

**COUNT I – BREACH OF EXPRESS WARRANTY**

23. Touchstone repeats paragraphs 1-22 above as if fully rewritten herein.
24. Novelty has breached its express warranty that it had the legal right to furnish the Lighters to Touchstone.

**COUNT II – BREACH OF IMPLIED WARRANTY**

25. Touchstone repeats paragraphs 1-22 above as if fully rewritten herein.
26. Novelty has breached the implied warranty of non-infringement that the Lighters would be delivered free of the rightful claim of any third person by way of infringement or the like.

**COUNT III – VIOLATION OF LANHAM ACT**

27. Touchstone repeats paragraphs 1-22 above as if fully rewritten herein.

28. Novelty's false representations violate Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

**COUNT IV – VIOLATION OF OHIO DECEPTIVE TRADE PRACTICE ACT**

29. Touchstone repeats paragraphs 1-22 above as if fully rewritten herein.
30. The forgoing acts by Novelty violate the Ohio Deceptive Trade Practice Act, O.R.C. chapter 4165.

**COUNT V- NEGLIGENT MISREPRESENTATION**

31. Touchstone repeats paragraphs 1-22 above as if fully rewritten herein.
32. Novelty failed to exercise reasonable care or competence in communicating to Touchstone Novelty's right to legally furnish the Lighters to Touchstone

**COUNT VI - RIGHT OF CONTRIBUTION**

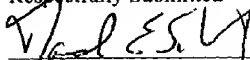
33. Touchstone repeats paragraphs 1-22 above as if fully rewritten herein.
34. Touchstone is entitled to contribution from Novelty of any settlement amount paid by Touchstone pursuant to O.R.C. §§ 2307.25 *et seq*

**WHEREFORE**, Plaintiff prays that it recover:

- A. All damages incurred by plaintiff, including but not limited to, all sums expended in connection with the South Carolina Action, including but not limited to all settlement amounts, attorneys fees, costs and expenses, with interest;
- B. Three times the amount of Plaintiff's damages;
- C. Plaintiff's attorneys fees, costs and expenses expended in connection with this action; and
- D. Such other and further relief as the Court deems just and proper.

Plaintiff demands a trial by jury.

Respectfully Submitted



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TRIAL ATTORNEYS FOR PLAINTIFF

CINLibrary 0108513.0557948 1899415v1

JS 44 (Rev. 12/07)

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THIS FORM.)

## I. PLAINTIFFS

(a) Touchstone Merchandise Group, LLC  
7405 Industrial Row Drive, Mason, OH 45040

(b) County of Residence of First Listed Plaintiff Warren  
(EXCEPT IN U.S. PLAINTIFF CASES ONLY)

(c) Attorney's (Firm) Name, Address, and Telephone Number  
David E. Schmitt, Esq., Frost Brown Todd LLC,  
201 E. Fifth St., Cincinnati, OH 45202, (513) 651-6800

## DEFENDANTS

Novelty, Inc.  
351 West Muskegon Drive, Greenfield, IN 46140  
County of Residence of First Listed Defendant Hancock  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                                   | DEF                                   |   | PTF                                   | DEF                                   |
|---|---------------------------------------|---------------------------------------|---|---------------------------------------|---------------------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1            | Incorporated or Principal Place of Business in This State     | <input checked="" type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input checked="" type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5            | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3            | Foreign Nation  | <input type="checkbox"/> 6            | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> 410 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 420 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 425 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 28 USC 157	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 430 Liquor Laws	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employees' Liability	<input type="checkbox"/> 440 R.R. & Truck	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deposition
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 450 Airline Regs	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Receiver Latheness and Court Organization
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Fed. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 460 Occupational Safety/Health	<input type="checkbox"/> 850 Securities	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veterans' Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 460 Other	<input type="checkbox"/> 860 Labor	<input type="checkbox"/> 490 Cable/Sat. TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 470 Fair Labor Standards Act	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 500 Selective Service
<input checked="" type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 720 Labor/Agmt. Relations	<input type="checkbox"/> 863 DTWC/DIWW (405(g))	<input type="checkbox"/> 550 Securities/Commodities/Exchange
<input type="checkbox"/> 195 Contract Product Liability		<input type="checkbox"/> 730 Labor/Agmt. Reprimand & Disclosure Act	<input type="checkbox"/> 864 SDT Title XVI (1965 RS) (405(g))	<input type="checkbox"/> 575 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise		<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 865 SDT Title XVI (1965 RS) (405(g))	<input checked="" type="checkbox"/> 590 Other Statutory Actions
		<input type="checkbox"/> 750 Other Labor Litigation	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 591 Agricultural Acts
		<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 592 Resource Substitution Act
				<input type="checkbox"/> 593 Environmental Matters
				<input type="checkbox"/> 594 Energy Allocation Act
				<input type="checkbox"/> 595 Freedom of Information Act
				<input type="checkbox"/> 900 Appeal of Fed. Determination Under Equal Access to Justice
				<input type="checkbox"/> 950 Constitutionality of State Statutes

## V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

(Cite the U.S. Civil Statute under which you are filing. Do not cite jurisdictional statutes unless diversity)

15 U.S.C. § 1125a and 28 U.S.C. §§ 1331 and 1332

Brief description of cause: Breach of Warranty, Lanham Act, Ohio Deceptive Trade Practice Act, Negligent Misrepresentation, Right of Contribution

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$  
To be Determined

CHECK YES only if demanded in complaint:  
JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions)

JUDGE

DOCKET NUMBER

DATE

10/15/2008

SIGNATURE OF ATTORNEY OF RECORD

David E. Schmitt

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG JUDGE